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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 355

HARVEY COAL CORPORATION,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF.

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INDEX.

Subject Index.

	Page
Petition:	
Questions presented	2
Reasons for allowance of writ	2
Conclusion	3
Brief:	
Opinion below	4
Jurisdiction	4
Questions presented	4
Statutes involved	4
Statement of the case	4
Specification of errors to be urged	11
Argument:	
1. No valid claim for abatement was filed	11
2. Validity of the abatement claim cannot be imputed from the lease	13
3. The petitioner may properly question the validity of the claim for abatement	15
4. The judgment of the trial court should have been reversed	18
Conclusion	19
Appendix	20

Table of Cases Cited.

Commissioner v. *Bryson*, 79 F. (2d) 397	12, 16
Davis v. *Henry Clay Fire Ins. Co.*, 216 Ky. 715, 288 S. W. 674	14
Denver Tramway Corp. v. *Rumry*, 52 P. (2d) 396, 398	14
Freiberg, Klein & Co. v. *B. H. & S. I. Co.*, 63 Tex. 449	14
Hull, A. G., v. *Commissioner*, 87 F. (2d) 260	16
Merchants' Nat. Tr. & Svgs. Bank v. *Welch*, 8 F. Supp. 949	12
Tower Hill, etc., Coke Co. v. *Heiner*, 25 F. Supp. 505	12, 16
United States v. *S. F. Scott & Sons, Inc.*, 69 F. (2d) 728	15

MISCELLANEOUS.

Page

Conference and Practice Requirements—Income Tax Unit, C. B. I.—1, 419, 420 17
Federal Rules of Civil Procedure:
Rule 15 18
Rule 52 (b) 18

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Your petitioner, Harvey Coal Corporation, by its attorney, prays that a writ of certiorari issue to review the decision of the United States Circuit Court of Appeals for the Sixth Circuit entered in the above entitled case on February 13, 1941 (118 F. (2d) 350), affirming the judgment of the United States District Court for the Eastern District of Tennessee, Northern Division, entered June 22, 1939 (not reported but found in 1939 CCH, ¶ 9604). A petition for rehearing filed in the lower Court March 13, 1941, was denied April 14, 1941. By order of this Court dated July 10, 1941, the time within which to file this petition was extended to and including August 8, 1941 (R. 154).

This is a suit for the recovery of Federal income and excess profits taxes for the calendar year 1917 collected after the statute of limitations had run. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938 (28 U. S. C. A., Sec. 347).

Questions Presented.

1. Was the additional tax and interest for 1917 collected from the appellant after the statutory period of limitation upon collection had expired?

2. Was the claim for abatement involved herein a valid claim so as to toll the statute of limitation?

3. Is the appellant estopped from denying the validity of the claim for abatement?

Reasons for Allowance of Writ.

1. The case presents an important Federal question which should be settled, namely, whether a claim for abatement filed by someone other than the taxpayer, and without the taxpayer's knowledge or consent, constitutes a valid claim so as to toll the statute of limitations upon collection.

2. The broad holding of the court below that a lease which provides for the payment of the lessor's Federal income and excess profits taxes by the lessee authorizes the lessee to file a claim for abatement which will be binding upon the lessor, though filed without its knowledge or consent, is fundamentally unsound.

3. The opinion of the court below impliedly sanctions the irregular procedure of the Commissioner of Internal Revenue in recognizing and negotiating with representatives of the lessee in connection with the lessor's tax lia-

bility, without the knowledge or consent of the lessor, the petitioner herein.

4. The opinion of the court below impliedly sanctions both the failure of the trial court to grant the petitioner's request for findings of fact, which are vital to the question of whether the claim for abatement was valid, and the dismissal, in toto, of the amended petition.

Conclusion.

For the foregoing reasons, which are amplified in the accompanying brief, it is respectfully requested that this petition be granted.

Respectfully submitted,

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BRIEF.

Opinion Below.

The opinion of the United States Circuit Court of Appeals for the Sixth Circuit (R. 153) is reported at 118 F. (2d) 350.

The opinion of the United States District Court for the Eastern District of Tennessee, Northern Division (R. 44) is not reported but appears in 1939 CCH, ¶ 9604.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938 (28 U. S. C. A., Sec. 347).

Questions Presented.

The questions presented appear in the petition for a writ of certiorari, *supra*, p. 2.

Statutes Involved.

The pertinent provisions of the statutes involved are set forth in the Appendix, *infra*, p. 20.

Statement of the Case.

The petitioner, plaintiff below, filed suit in the United States District Court for the Eastern District of Tennessee, Northern Division, for the recovery of additional Federal income and excess profits taxes and interest thereon for the calendar year 1917, in the sum of $29,015.97, together with interest (R. 1). The sole ground for recovery alleged in the original petition, filed December 23, 1929 (R. 1), was that the additional tax of $19,812.91, plus interest of $9,203.06 was collected January 29, 1925, after

the expiration of the statutory period of limitation. The answer thereto (R. 14) included a plea of confession and avoidance, alleging the filing of an abatement claim by the taxpayer July 25, 1919, which operated as a stay of collection.

By amended petition, filed July 13, 1933 (R. 18), over the oral objection of defendant (R. 25), plaintiff restated its allegations with respect to the issue involving the statute of limitations, correcting certain errors with respect thereto. It also set up new grounds for recovery. The defendant moved to strike the amended petition on the ground that it raised new issues after the statutory period for commencing suit had run (R. 25). Action on said motion was deferred until the court rendered its opinion, at which time it was sustained (R. 52). The answer to the amended petition contained a plea of confession and avoidance (R. 29) which is identical with that filed to the original petition (R. 14). Plaintiff's reply to the answer denies any knowledge of the assessment by the Commissioner of Internal Revenue of an additional tax for the year 1917, or the filing of an abatement claim in connection therewith, either by plaintiff or its predecessor, Harvey Coal Company, and avers that if any abatement claim was filed, it was without the knowledge, sanction, authority, or ratification of the Harvey Coal Company (R. 31, 34).

Trial was had July 26, 1933 (R. 72). Requests for special findings were filed by the plaintiff September 25, 1934 (R. 36), and by the defendant October 12, 1935 (R. 36).

June 22, 1939, the District Court sustained the defendant's motion to strike the amended petition and dismissed the action. It disregarded the amended petition insofar as it sought to amend with respect to the issue raised in the original petition, and likewise disregarded the uncontroverted evidence in support thereof. Instead, it regarded

only the new issues raised in the amended petition, which were expressly waived on appeal.

July 3, 1939, plaintiff filed a motion for additional findings of fact and amendment of judgment (R. 53). Pursuant to memorandum of the lower court filed July 12, 1939 (R. 53), plaintiff, on July 26, 1939, filed a detailed list of additional and amended findings requested (R. 54), which requests were allowed in part August 29, 1939 (R. 66), without any change in the opinion (R. 47) or judgment (R. 53).

The Circuit Court affirmed the judgment of the District Court, *per curiam*, February 13, 1941 (R. 153). Petition for rehearing filed March 13, 1941 (R. 154) was denied April 14, 1941 (R. 154).

Facts.

Harvey Coal Corporation, the plaintiff, was incorporated under the laws of the State of Tennessee, November 20, 1924 (R. 130), and is the successor of Harvey Coal Company, a Tennessee corporation, organized March 16, 1915, with its executive office at Knoxville, Tennessee, and mine operating office at Staub, Perry County, Kentucky (R. 85, 129). Up to October 30, 1917, Harvey Coal Company was engaged in the mining of coal (R. 72, 82).

On that date, it leased its mining properties to The Hazard Jellico Coal Company, a Delaware corporation (R. 130). The Hazard Jellico Coal Company was one of twenty-odd mining companies owned by the Jewett-Bigelow & Brooks Company, a Michigan corporation, with its principal office at Detroit (R. 72, 73, 78). The executive office of The Hazard Jellico Coal Company was at Detroit, the operating office at Cincinnati, and the mine operating office at Staub, Kentucky (R. 73).

Under said lease (R. 130), The Hazard Jellico Coal Company covenanted to pay all taxes including Federal income and excess profits taxes "which have been or which may

hereafter be assessed against Harvey Coal Company for the year 1917'' (Par. 5). Said lease also stipulated that E. L. Douglass, the then General Manager of Harvey Coal Company, should be placed in charge of the properties leased by The Hazard Jellico Coal Company and should have full charge of the mining operations conducted thereon (Par. 7).

Prior to October 30, 1917, E. L. Douglass, an engineer, was General Manager of the Harvey Coal Company and in charge of the operation of its mine (R. 72, 82). He was not an officer of the company (R. 82). On October 30, 1917, Douglass left the employ of Harvey Coal Company and, pursuant to the terms of said lease, became Vice President and Manager of operations of The Hazard Jellico Coal Company, with his office at Staub, Kentucky (R. 72, 73, 82).

The Federal income and excess profits tax returns of Harvey Coal Company for the year 1917, filed March 21, 1918, were signed and sworn to by C. H. Harvey, President, and Fritz Staub, Treasurer, and the address shown was Staub, Kentucky (R. 73, 132). The original tax of $33,431.73 is not in controversy.

Thereafter, the Commissioner of Internal Revenue made an audit of said returns, the results of which appear in his letter dated January 6, 1919 (R. 95). Said letter shows a total tax assessable of $77,751.23 and an additional tax liability of $44,319.50, which was assessed on the April, 1919, List (R. 95, 123). Neither this letter nor its contents were made known to the officers of Harvey Coal Company (R. 73, 83), although it was addressed to Harvey Coal Company, Staub, Kentucky (R. 95). Instead, the Commissioner's letter of January 6, 1919, was forwarded to Mr. John R. Schindel, Cincinnati, Ohio, attorney for The Hazard Jellico Coal Company (R. 73, 79).

Under date of July 24, 1919, in response to demand for said additional tax of $44,319.50, a letter was addressed

to the Collector of Internal Revenue, Danville, Kentucky, enclosing a check in the sum of $16,694.14 and a claim for the abatement of the balance, $27,625.36 (R. 102-103). This letter was signed "Harvey Coal Company by E. L. Douglass, General Manager" (R. 103). The claim for abatement referred to in said letter of July 24, 1919, is signed "Edward L. Douglass, General Manager, Harvey Coal Company" and was sworn to July 24, 1919, in Hamilton County, Ohio (R. 97). Attached to said claim for abatement are several documents. The first is a copy of letter dated July 10, 1919, addressed to the Commissioner of Internal Revenue from Waite, Schindel & Bayless (R. 99), the original of which was mailed July 10, 1919 (R. 103). Said letter refers to affidavits of Mr. E. L. Douglass "former General Manager" of Harvey Coal Company (R. 99, 100). Two affidavits of E. L. Douglass, "former General Manager" of Harvey Coal Company, were attached (R. 100, 102). While it was contemplated sending the abatement claim to the Harvey Coal Company for execution, for some reason this was not done (R. 78, 79, 81, 106).

By letter dated October 11, 1920, addressed to Harvey Coal Company, Staub, Kentucky, the Commissioner of Internal Revenue allowed the said claim for abatement in the amount of $5,466.08 and rejected the same in the amount of $22,159.28 (R. 104-106).

The Commissioner's letter dated January 8, 1924, addressed to Harvey Coal Company, Staub, Kentucky (R. 115), set forth the result of the reexamination of the company's returns for the year 1917 "in connection with information furnished in support of your claim for the abatement of $27,625.36" and proposed an additional allowance of $34.32. By letter dated February 5, 1924, to the Commissioner of Internal Revenue from the National Tax Service Bureau, Washington, D. C., and under the alleged authority of a power of attorney from The Hazard Jellico

Coal Company, "the successors of the Harvey Coal Company," an appeal was transmitted directed to said letter dated January 8, 1924 (R. 119-120). The appeal was signed "The Harvey Coal Company, Hazard Jellico Coal Company (Successors) by E. H. Jewett, President" and was attested by E. C. Smith, Secretary.

As a result of said "appeal", a reaudit of the returns of Harvey Coal Company for 1917 was made, resulting in an additional allowance of $2,346.37, in lieu of that set forth in letter dated January 8, 1924. This allowance appears in a certificate of overassessment addressed to Harvey Coal Company, Staub, Kentucky, dated November 17, 1924 (R. 120-123).

Up to this point, the officers of Harvey Coal Company knew nothing of any of the audits made by the Bureau of Internal Revenue, nor of letters setting forth the results thereof, nor conferences or protests appertaining thereto; neither did they have any knowledge of any claim for abatement filed allegedly on behalf of Harvey Coal Company; nor did they at any time ratify or approve the filing of said claims (R. 73, 74, 75, 76, 77, 78, 79, 80, 81, 83, 84, 85, 94, 99, 103, 106, 108, 109, 110, 111, 112, 113, 114, 118, 119, 120, 148, 149). In fact, it was not until January 17, 1925, that they or the officers of the newly formed Harvey Coal Corporation acquired any knowledge of the additional tax for the year 1917, when the demand for payment of the unabated portion was made of the appellant by the Collector (R. 83, 85, 86). Mr. Douglas on two or three different occasions had assured the Secretary and Treasurer of Harvey Coal Company that all the income taxes had been paid (R. 83).

All correspondence with respect to the audits of Harvey Coal Company's returns for 1917 and the said abatement claim, as well as all conferences with respect thereto, were carried on between the Commissioner and representatives

of The Hazard Jellico Coal Company (R. 73, 74, 75, 76, 77, 78, 79, 80, 81, 99, 103, 106, 107, 108, 109, 110, 111, 112, 113, 114, 118, 119, 120, 148, 149). The Hazard Jellico Coal Company paid such representatives for such services (R. 80, 110). The records of the Commissioner of Internal Revenue show that no one was authorized to represent Harvey Coal Company for 1917 previously to August 19, 1926 (R. 129) and that no one was authorized to represent Harvey Coal Corporation previously to February 4, 1930 (R. 128).

The Hazard Jellico Coal Company was in a good financial condition during the years 1919 to 1921 and could have paid the amount of the claim for abatement, $27,625.36, had the defendant made a definite move to collect (R. 74, 76). It was not until 1924 that the Hazard Jellico Coal Company became involved in financial difficulties (R. 74). In April of that year, the company went into receivership (R. 80) and Harvey Coal Company repossessed the leased premises (R. 84). The appellant paid under protest the additional tax of $19,812.91 plus interest of $9,203.06, or a total of $29,015.97, January 8, 1925 (R. 83, 86-87, 133).

Four claims for refund were filed relating to the income and excess profits tax liability of Harvey Coal Company for the year 1917 (R. 125, 135, 141, 145). Only one of these claims is now in issue. That is the claim filed May 2, 1927, with the Collector at Nashville and by him forwarded to the Collector at Louisville, Kentucky, where it was received May 12, 1927 (R. 145). This claim is based upon the erroneous and illegal collection of the sum of $29,015.97, additional tax and interest for 1917, after the statute of limitations had run. It forms the sole ground in the original petition (R. 1) and is the principal ground set forth in the amended petition (R. 18). Said claim has never been rejected by the Commissioner of Internal Revenue (R. 95).

Specification of Errors to be Urged.

The court below erred:

1. In holding that the statute of limitations upon collection of the tax was tolled by a valid claim for abatement.

2. In holding that the lease involved herein vested the lessee with authority to file a claim for abatement which would bind the lessor, petitioner herein.

3. In holding that petitioner is without right to question the validity of the claim for abatement filed.

4. In failing to reverse the judgment of the District Court.

ARGUMENT.

1. **No valid claim for abatement was filed.**

The error of the lower court in sustaining the decision of the trial court is manifest if no valid claim for abatement was filed so as to stay the statutory period for collection of the additional tax. That no valid claim for abatement was filed is apparent from the facts of record in this case.

The trial court in its findings of fact states that certain claims in abatement were filed which enured to the benefit of the taxpayer (R. 44). Nowhere in the findings of fact does it appear who filed the abatement claim. The petitioner sought to clarify the facts in this regard by its request for additional and amended findings of fact (R. 54), but was unsuccessful. Neither was it able to correct this omission of vital facts in the court below. Only one claim for abatement was filed and that claim shows on its face (R. 97) that it was not the claim of the petitioner, since it is executed, not by the taxpayer but by

"Edward L. Douglass, General Manager, Harvey Coal Company", which is further explained, by the attachments thereto (R. 99-102), as referring to Edward L. Douglass "*former* General Manager". At that time, Mr. Douglass was Vice President and Manager of operations for The Hazard Jellico Coal Company, the lessee.

It is fundamental that under the law, regulations, and practice then in effect, an assessment of additional tax against a taxpayer could be stayed only by the filing of an abatement claim, or the equivalent thereof *by the taxpayer.* Clearly, this was not the claim of the taxpayer, but was one filed, without the knowledge or consent of the taxpayer, and by someone who was wholly unauthorized by the taxpayer to file it.

Little in the way of authorities should be required to support the obvious proposition that Harvey Coal Company cannot be bound by any act of an unauthorized person presuming to act in its behalf, but without its knowledge or consent, and without any subsequent ratification or adoption by it or its successor, the appellant. The scarcity of authorities attests the axiomatic character of this proposition. A few decisions, however are helpful, principal among which is *Commissioner* v. *Bryson,* 79 F. (2d) 397. In that case, the question involved was the validity of a waiver which had been executed by a *former* Secretary of the corporation. It was held to be invalid for the reason that a *former* officer lacked authority to bind the corporation. To the same general effect are *Merchants' Nat. Tr. & Svgs. Bank* v. *Welch,* 8 F. Supp. 949; *Tower Hill, etc. Coke Co.* v. *Heiner,* 25 F. Supp. 505.

If a former officer cannot bind a corporation, certainly a *former employee* cannot. In the *Bryson* case, *supra,* as in this case, the Commissioner was put on notice that he was dealing with a *former* officer or employee of the taxpayer, and in this case, as in the *Bryson* case, it should

have been held that the Commissioner "as a reasonable man, should have been put on notice that both in fact and in law, he had before him an abortive paper," which did not bind the corporation.

The lower court took the view that the inherent and fatal effects in the abatement claim filed could be disregarded because of the lease between the taxpayer and the Hazard Jellico Coal Company.

2. Validity of the abatement claim cannot be imputed from the lease.

By lease dated October 30, 1917, the taxpayer leased its mining properties to the Hazard Jellico Coal Company (R. 130). Paragraph 5 thereof provides for the payment by the lessee of all taxes, including all Federal income and excess profits taxes assessable against the lessor for the year 1917. This provision, in the opinion of the lower court, vested the lessee with authority to file a claim for abatement which would be binding upon the lessor, the petitioner herein. Such a view is remarkable in two respects: first, it disregards the established practice and procedure whereby a taxpayer, and the taxpayer alone, could stay the collection of a tax by the filing of an abatement claim and, secondly, it conflicts with the general law on the subject. Furthermore, it is questionable whether the claim was filed by the lessee since it was executed by an individual representing himself to be a former General Manager of the taxpayer.

In view of the normally adverse interests of the lessor and the lessee under a lease, the authorities are uniformly to the effect that a lease does not constitute a contract of agency unless specifically so provided. While there sometimes is doubt as to whether a particular document constitutes a lease or a contract of another nature, once it is resolved to be a lease, the lessee cannot bind the lessor

under any theory of agency; neither can a third party collaterally raise the issue. Such was the holding in *Freiberg, Klein & Co.* v. *B. H. & S. I. Co.*, 63 Tex. 449. A more recent decision, in *Denver Tramway Corp.* v. *Rumry*, decided by the Supreme Court of Colorado in 1935, 52 P. (2d) 396, 398, enunciated the doctrine as follows:

> The relation of landlord and tenant exists by virtue of contract, and a tenant is not the agent of the landlord for any purpose, unless made so by specific agreement.

In principle, this is the holding in *Davis v. Henry Clay Fire Ins. Co.*, 216 Ky. 715, 288 S. W. 674.

The facts in the case at bar illustrate the sound reasoning behind these decisions. In 1919 when the abatement claim was filed, the lessee, The Hazard Jellico Coal Company, was in good financial condition and could have paid the amount of tax involved had the Collector of Internal Revenue demanded payment from the taxpayer. Unknown to the taxpayer, the lessee conducted negotiations with the Commissioner of Internal Revenue relative to the abatement claim, extending into the year 1924. By that time, the lessee had become involved in financial difficulties and was in receivership. Thus, instead of acting as agent for the lessor, it acted adversely to the lessor's interest, and, thereby, was able to escape payment of the lessor's tax under paragraph 5 of the lease.

There being no specific agreement in the lease which would authorize the lessee to file an abatement claim which would have binding effect upon the lessor, the inherent defects in the abatement claim are not aided or cured by the lease and the claim for abatement remains ineffective and invalid.

3. The petitioner may properly question the validity of the claim for abatement.

The opinion of the court below indicates some misgivings as to the validity as to the claim for abatement but sustains the decision of the trial court on the basis that the petitioner is without right to question the validity of the claim whether on the ground of estoppel, agency, or on the principle of taking a position inconsistent with one previously assumed.

The application of the principles of agency to this situation are clearly removed by the showing of an absence of agency under the lease. The implication that there has been a change of position on the part of the petitioner may be as summarily disposed of by pointing to the undisputed facts that the petitioner had no knowledge of the proposed assessment of the additional tax, the filing of an abatement claim, or any negotiations with respect thereto, until 1925, when demand for payment was made following the final rejection of the abatement claim. The position then taken, and the only position that ever has been taken by petitioner, was that the tax was collected after the running of the statute of limitations.

The remaining ground asserted by the court below in denying the petitioner the right to question the validity of the claim is that of estoppel. The application of the doctrine of estoppel is clearly defined by the decided cases. It is well stated in *United States* v. *S. F. Scott & Sons, Inc.*, 69 F. (2d) 728, as follows:

> To constitute estoppel (1) there must be false representation or wrongful misleading silence. (2) The error must originate in a statement of fact and not in an opinion or a statement of law. (3) The person claiming the benefits of estoppel must be ignorant of the true facts, and (4) be adversely affected by the

> acts or statements of the person against whom an estoppel is claimed.

It is difficult to understand how the appellant or its predecessor, Harvey Coal Company, could have misled the Commissioner with respect to the abatement claim. Misleading is a deliberate act, which necessarily presupposes knowledge. In the absence of knowledge, as in this case, there could be no misleading. The abatement claim showed, by its attachments, the lack of authority on the part of E. L. Douglass and, consequently, the lack of legal effect so far as Harvey Coal Company was concerned. As stated in the concurring opinion in *Commissioner* v. *Bryson, supra:*

> I know of no doctrine of estoppel to deny that a written instrument is something other than what its terms necessarily import, except as based on some fraud or misrepresentation.

In the language of the Circuit Court of Appeals for the Fourth Circuit in *A. G. Hull* v. *Commissioner,* 87 F. (2d) 260:

> Estoppel is an affirmative defense and the burden is upon the party asserting it to establish both the facts necessary to support it and the fairness of its application and a party either knowing the facts, *or in a position to know them* cannot claim the benefit of estoppel. Helvering *v.* Brooklyn City R. R. Co., 72 F. (2d) 274. Jones on Evidence (3rd Ed.) Par. 279. (Italics supplied.)

Tested by this language the doctrine of estoppel utterly fails in its application to the facts in the case at bar. To the same effect is *Tower Hill, etc., Coke Co.* v. *Heiner, supra.*

It is well to consider at this point the old principle of equity, amounting to an adage, that where one of two

innocent parties must suffer, the loss must fall upon him whose act or failure to act occasioned the loss. If the Collector of Internal Revenue or his principal, the Commissioner of Internal Revenue, is, therefore, an innocent party, it was nevertheless through his negligent acts that collection of the additional tax for the year 1917 was delayed beyond the statutory period of limitations.

The Commissioner of Internal Revenue was on notice at the outset that the claim for abatement was not a valid claim. In corresponding with and recognizing persons other than the duly accredited representatives of the taxpayer in discussing the taxpayer's tax liability, the Commissioner departed from his own rules and regulations with respect to powers of attorney. Typical of such rules are the "Conference and Practice Requirements—Income Tax Unit" issued by the Commissioner under date of June 1, 1922, C. B. I—1, 419, 420, which requires that in the case of a corporation, a power of attorney "must be signed by an officer of the corporation, attested by the secretary under the seal of the corporation and executed before a notary or attested" by two disinterested individuals.

It is established in this case that the records of the Commissioner of Internal Revenue show that no one was authorized to represent Harvey Coal Company for 1917 previously to August 19, 1926 (R. 129), and that no one was authorized to represent Harvey Coal Corporation previously to February 4, 1930 (R. 128).

The lower court impliedly excuses this dereliction on the part of the Commissioner because of the lease with the Hazard Jellico Coal Company. But, according to the specific findings of the trial court, "the defendant had no notice of this lease" (R. 44). Even if the Commissioner had known of the provisions in the lease, his irregularity in departing from his customary and established procedure

with respect to recognition of taxpayer's representatives would have been inexcusable. Without such knowledge the opinion of the lower court in that regard falls of its own weight.

It was the prolonged negotiations, extending over approximately five years, which account for the fact that collection of the additional tax was not timely made, and for the further fact that when the taxpayer was notified of such liability and demand for payment made of it, no recourse could be had under the lease because of the supervening receivership of the lessee.

4. The judgment of the trial court should have been reversed.

The attention of the lower court was called to the failure by the District Court to make specific findings of fact, particularly with reference to the abatement claim upon the validity of which this case turns. It also was requested to correct the error of the District Court in dismissing the amended petition in its entirety, rather than permitting such portion thereof as constituted an amendment by way of clarification of the original petition, to stand. During the six year period between the date of the trial and the date of decision by the District Court, the Federal Rules of Civil Procedure became operative. Under those liberalized rules, the amended petition in so far as it did not introduce a new cause of action should have been allowed "as matter of course" (Civ. Proc. Rule 15) and the request for additional and amended findings of fact, to correct omissions and conclusions in the trial court's findings, should likewise have been allowed (Civ. Proc. Rule 52 (b)).

These errors by the District Court were impliedly sanctioned by the lower court without comment.

Conclusion.

For the foregoing reasons, it is respectfully urged that the petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX.

The applicable provisions of the Revenue Acts involved are as follows:

Sec. 250 (d) of the Revenue Act of 1921 (c. 136, 42 Stat. 227, 265):

Sec. 250 (d). The amount of income, excess profits, or war-profits taxes due under any return made * * * under prior income, excess profits, or war-profits tax acts, shall be determined and assessed within five years after the return was filed * * *; and no suit or proceeding for the collection of any such taxes * * * shall be begun, after the expiration of five years after the date when such return was filed * * *.

Sec. 277 (a) (2) of the Revenue Act of 1924 (c. 234, 43 Stat. 253, 299):

Sec. 277 (a) (2). The amount of income, excess profits and war-profits taxes imposed by the Revenue Act of 1917, * * * shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period.

Sec. 611 of the Revenue Act of 1928 (c. 852, 45 Stat. 791, 875):

Sec. 611. Collections stayed by claim in abatement.

If any internal-revenue tax (or any interest, penalty, additional amount, or additioin to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection.

Sec. 607 of the Revenue Act of 1928 (c. 852, 45 Stat. 791, 874):

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	3
Argument	7
Conclusion	10
Appendix	11

CITATIONS

Cases:	
Commissioner v. *Bryson*, 79 F. (2d) 397	7
Denver Tramway Corp. v. *Rumry*, 98 Colo. 24	7
Hull v. *Commissioner*, 87 F. (2d) 260	9
United States v. *S. F. Scott & Sons*, 69 F. (2d) 728	9
Statutes:	
Revenue Act of 1921, 42 Stat. 227:	
Sec. 250	11
Revenue Act of 1924, 43 Stat. 253:	
Sec. 277	11
Revenue Act of 1928, 45 Stat. 791:	
Sec. 607 (U. S. C., Title 26, Sec. 1670)	11
Sec. 611	12

409537—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 355

HARVEY COAL CORPORATION, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court of the United States for the Eastern District of Tennessee, Northern Division (R. 44–52, 66–67) is not officially reported. The opinion of the Circuit Court of Appeals for the Sixth Circuit (R. 153–154) is reported in 118 F. (2d) 350.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 13, 1941 (R. 153). By order entered April 14, 1941, a petition for rehearing was denied (R. 154). After an order had been entered extending the time within which to file the petition to and including August 8, 1941 (R. 154), the petition for certiorari was filed August 7, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

In October 1917 taxpayer leased its coal properties under an agreement by which the lessee undertook the payment of all taxes which might be assessed against the lessor for 1917. In 1919, after a deficiency notice had been addressed to the taxpayer and received by the lessee, a claim for abatement, in the name of the taxpayer, was filed, signed by its former officer who was then employed by the lessee. As a result of negotiations extending until 1924, the claim was allowed in part. The taxpayer paid the balance in 1925. The question is whether the claim for abatement was valid so as to toll the statute of limitations under Section 611 of the Internal Revenue Act of 1928.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra,* pp. 11–12.

STATEMENT

The facts as disclosed by the record and the opinion of the District Court (R. 44–52) may be summarized as follows:

Harvey Coal Company is a Tennessee corporation organized on March 16, 1915 (R. 129). On March 21, 1918, the company filed an income and excess profits tax return for the year 1917 showing taxes due and payable in the sum of $33,343.74. The principal office was reported as Staub, Kentucky, and the return, signed by its president and treasurer, was filed with the Collector of Internal Revenue for the District of Kentucky (R. 73, 132). The tax reported was assessed and paid and is not in controversy.

On October 30, 1917, prior to filing the 1917 return, the company leased its properties to Hazard Jellico Coal Company, a Delaware corporation (R. 130). Under the terms of the lease the lessee agreed to pay all taxes, including income taxes and excess profits taxes for the year 1917 which had been or might be assessed against the lessor. It was also agreed that E. L. Douglass, then general manager of Harvey Coal Company, should be placed in charge of the leased premises with full power and authority to direct and control the mining operations, improvement and development of the premises, and that in the event of the death, incapacity, or resignation of Douglass during the term of the lease, the Harvey Coal Company should have the right to name his successor (R. 130–131).

As contemplated in the agreement, Douglass left the employ of Harvey Coal Corporation and became vice president and general manager of the Hazard Jellico Coal Company (R. 72–73, 82).

Subsequently an investigation and audit was made of the 1917 tax return of the Harvey Coal Company, and in April, 1919, additional taxes of $44,319.50 were assessed (R. 33, 44, 86, 95, 123). A letter determining this deficiency was addressed to Harvey Coal Corporation, Staub, Kentucky (R. 95). This and other communications were received by the taxpayer's lessee at that address.

On July 24, 1919, in response to the demand for the additional tax, a letter was sent to the Collector of Internal Revenue at Danville, Kentucky, enclosing a check in the sum of $16,694.14, and a claim for the abatement of the balance of $27,625.36 (R. 102-103). The letter and the claim for abatement were signed in the name of the Harvey Coal Company, "by E. L. Douglass, General Manager" (R. 103). Concerning the claim for abatement, a letter from Harvey Coal Corporation, by C. H. Harvey, President, to the Commissioner of Internal Revenue, dated March 17, 1925, gives the following further information (R. 137):

> The officers of this company decided that this Claim for Abatement be filed as they had no information regarding this tax and in as much as under contract the tax should have been paid by the other parties all of the files regarding same was in their hands.

There was considerable correspondence with reference to the claim for abatement, and at least one conference was held at the request of Mr. Douglass and the firm of Waite, Schindel & Bayless, of Cincinnati.[1] Upon cross-examination, Mr. Schindel, a partner in this firm, testified that in his various conferences and letters with the Bureau of Internal Revenue he "invariably * * * gave them to understand" that he was representing the Harvey Coal Company (R. 81).

Several abatements were granted by the Bureau of Internal Revenue (R. 15, 86, 105, 115). The last was on November 17, 1924, when the taxpayer was notified that it had been allowed an additional amount of $2,346.37 on its claim, leaving a balance due of $19,812.91 (R. 15, 86). By this time Hazard Jellico Coal Company as lessee had become financially unable to fulfill its obligation under the lease agreement. It was in receivership from the middle of April, 1924 (R. 80). Therefore, on January 28, 1925, pursuant to demand made by the Commissioner of Internal Revenue, Harvey Coal Corporation paid the balance, together with interest in the amount of $9,203.06, or a total of $29,015.97 (R. 86–89). The corporation had been organized in 1924 and had taken over the assets and

[1] In one instance during the negotiations the firm signed a letter to the Deputy Commissioner of Internal Revenue as "attorneys for the Harvey Coal Company" (R. 112, 113, 114, 149).

liabilities of the Harvey Coal Company (R. 84, 130, 133).

After making the payment the taxpayer [2] then filed a series of claims for refund. The final claim was signed and sworn to on April 30, 1937, and stated as a further ground for refund that the Government was barred by the statute of limitations from collecting the amount claimed (R. 145). This ground is the basis of the original petition filed by the taxpayer (R. 1–11). The Government filed a plea of confession and avoidance alleging that the taxpayer had filed a claim for abatement which tolled the statute of limitations (R. 15). An amended petition (R. 18–24) was filed by the taxpayer alleging additional grounds for refund, but they are not pertinent to the issues raised by the petition for certiorari. The District Court sustained the Government's motion to strike the amended petition, and held, *inter alia,* that taxpayer could not "be heard to contend that the claims in abatement which suspend the statute of limitations were not filed or authorized by it, and that, therefore, the defendant's collection of the taxes was not after the statutory period expired" (R. 52). The decision of the District Court was

[2] For the purposes of this petition for certiorari, it will not be necessary to distinguish between Harvey Coal Company, against whom the tax was assessed, and Harvey Coal Corporation, by whom it was paid. Both concerns will therefore here be referred to as the taxpayer.

affirmed by the Circuit Court of Appeals (R. 153–154).

ARGUMENT

The Circuit Court of Appeals held that under the terms of the lease agreement the lessee was not only obligated to pay the 1917 taxes but as a necessary incident was vested with authority to contest their correctness and validity and to file a claim of abatement. In these circumstances, the claim which was filed on taxpayer's behalf was clearly effective to toll the statute of limitations, pursuant to the provisions of Section 611 of the Revenue Act of 1928, Appendix, *infra*. The conclusion of the court thus hinges primarily upon a factual determination in respect of the scope of the lessee's authority. It is fully substantiated by the terms of the lease agreement (R. 130).[3] Further, the fact that taxpayer left the files regarding the tax with the lessee (R. 137) indicates that the latter properly assumed responsibility in the matter.

There is no conflict of authority with the decision below upon this question. *Commissioner* v.

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[3] The state court decisions cited in taxpayer's brief (p. 14) do not militate against this conclusion; there is no reason to disagree with the general principle enunciated in *Denver Tramway Corp.* v. *Rumry*, 98 Colo. 24, 28, that:

"The relation of landlord and tenant exists by virtue of contract, and a tenant is not the agent of the landlord for any purpose, unless made so by specific agreement * * *."

Bryson, 79 F. (2d) 397 (C. C. A. 9), the only circuit court opinion cited for the proposition that the lessee here was not vested with authority to file the claim of abatement, involved readily distinguishable facts. In that case Bryson had signed a tax waiver as "Former Secretary of the Bryson-Robison Corp.," a dissolved corporation (p. 399). The court concluded (p. 401) that neither on its face nor in the light of the accompanying letter could the document be regarded as a valid waiver, since it was signed by a *former* secretary as such and since the letter emphatically put the Commissioner on notice that the signer considered himself only as a former officer of the corporation and that he did "not presume to act" for it. Here, on the other hand, the Hazard Jellico Coal Company was obligated under the lease agreement to pay the taxes and acted on behalf of the taxpayer in the matter until its receivership.[4]

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[4] It is true that the attachments which accompanied the claim for abatement in the instant case referred to E. L. Douglass as "former General Manager" (R. 99–102). But this alone cannot bring the case within the facts of the Bryson case, where the court found that the Commissioner was "emphatically" put on notice by the form of the waiver and the expressly worded accompanying explanation. In the instant case, there is no finding of notice to the Commissioner. The terms of the lease, the method of Douglass' signature on the claim itself, the absence of any disclaimer of presumption to act but, on the contrary, an express representation throughout of authority to act on behalf of taxpayer, all serve to dissipate the significance of the reference to Douglass as former manager.

Nor is certiorari warranted in respect of other issues raised in the opinion of the Circuit Court of Appeals. The court's decision does not rest upon estoppel, or upon the proposition that taxpayer may not assume an inconsistent position at the expense of the Government. Since the court already found that the lessee was empowered to file a claim of abatement on taxpayer's behalf, the suggestion that under one or the other of such principles the taxpayer had no right to question the authority of the lessee was merely offered at the end of its opinion as an alternative and supplemental reason for disapproving the refund.[5]

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[5] In any event, the authorities upon which taxpayer relies in this connection (Pet. 15–16) are not in conflict with the case at bar. In *Hull* v. *Commissioner*, 87 F. (2d) 260 (C. C. A. 4), the court found that the transaction had been investigated and all the facts were before the Bureau of Internal Revenue long prior to the expiration of the statute of limitations. Under these circumstances, it was held that the party knowing the facts cannot claim the benefit of estoppel. Similarly, in *United States* v. *S. F. Scott & Sons*, 69 F. (2d) 728 (C. C. A. 1), the court pointed out that error had originated out of misinterpretation of the law rather than ignorance of the facts concerning the assessment of the tax. Here, on the other hand, there has been no finding that the Commissioner either knew or should have known that the lessee was acting without authority on taxpayer's behalf, and the Commissioner relied on the abatement claim in delaying the collection of the tax.

CONCLUSION

The decision of the court below is correct. There is no conflict of authority. No sufficient reason has been shown for review and the petition should therefore be denied.

Respectfully submitted.

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AUGUST 1941.

APPENDIX

Revenue Act of 1921, 42 Stat. 227:

> SEC. 250. * * *
>
> (d) The amount of income, excess-profits, or war-profits taxes due under any return made * * * under prior income, excess-profits, or war-profits tax Acts, * * * shall be determined and assessed within five years after the return was filed * * *; and no suit or proceeding for the collection of any such taxes * * * shall be begun, after the expiration of five years after the date when such return was filed * * *.

Revenue Act of 1924, 43 Stat. 253:

> SEC. 277. (a) Except as provided in section 278 and in subdivision (b) of section 274 and in subdivision (b) of section 279—
>
> * * * * *
>
> (2) The amount of income, excess-profits, and war-profits taxes imposed by the * * * Revenue Act of 1917, * * * shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period.

Revenue Act of 1928,

> SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.
>
> Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the

enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim (U. S. C., Title 26, Sec. 1670).

* * * * *

SEC. 611. COLLECTIONS STAYED BY CLAIM IN ABATEMENT.

If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection.

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HARVEY COAL CORPORATION,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION.

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION.

The petitioner desires briefly to reply to the respondent's brief in opposition to the petition for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit in order to correct and clarify some of the respondent's statements.

On page 4 of the respondent's brief under the heading "Statement", the claim for abatement upon which the decision in this case turns is mentioned. Immediately following, there appears this sentence:

> "Concerning the claim for abatement, a letter from Harvey Coal Corporation, by C. H. Harvey, President, to the Commissioner of Internal Revenue, dated March 17, 1925, gives the following further information (R. 137):
>
> 'The officers of this company decided that this claim for abatement be filed * * *.'"

The natural implication is that the claim for abatement referred to in the taxpayer's letter of March 17, 1925, is the one which was filed July 24, 1919. However, the particular claim for abatement referred to in the letter dated March 17, 1925, is one which the Harvey Coal Corporation sought to file at the time it received notice in January, 1925, that the Collector was demanding the payment of additional tax for 1917, and is the one last mentioned in the previous paragraph of its letter. Until January, 1925, it had no knowledge of any proposed additional tax liability for 1917, much less, the claim for abatement filed July 24, 1919. Furthermore, respondent fails to quote correctly from the record (R. 137) when it states that the officers of the company "decided" instead of "desired" that the said claim for abatement, referred to above and in its letter dated March 17, 1925, be filed.

The same letter dated March 17, 1925 (R. 137), is the basis for a distorted statement of fact under "Argument" on page 7 of respondent's brief. There, reference is made to "the fact that taxpayer left the files regarding the tax with the lessee." The letter dated March 17, 1925, does not say that the taxpayer *left* the files with the lessee but states simply that "all of the files regarding same (*i. e.*, the additional tax) was in their hands."

The respondent's brief at pages 7-8, seeks to distinguish *Commissioner* v. *Bryson*, 79 F. (2d) 397, from the case at bar. In so doing, it is pointed out that in the *Bryson* case, the Commissioner was emphatically put on notice that he was dealing with someone who did not presume to act for the taxpayer, whereas, in the instant case, the lessee was obligated under the lease to pay taxes. The inference to be gathered from this attempted distinction is that because of the lease, the Commissioner was not put on notice that in dealing with the lessee he was dealing with an unauthorized representative of the taxpayer. The complete answer to

the attempted distinction on page 8 and footnote 4 of the respondent's brief is that by a specific finding of the trial court "the defendant had no notice of this lease" (R. 44).

Without any notice of a lease, the Commissioner had no possible justification for entertaining an abatement claim unless it was filed by the taxpayer. For the same reason, the Commissioner was as emphatically on notice that he should not correspond or hold conferences with anyone other than the taxpayer's accredited representatives nor should he have delayed the collection of the tax.

The last sentence in footnote 5 on page 9 of respondent's brief relies upon the absence of a finding that the Commissioner either knew or should have known that the lessee was acting without authority. Such a "finding" would have been a conclusion of law, which would follow naturally from the fact that the Commissioner had no notice of the lease—a fact which was found (R. 44). Without knowledge of the lease or without express authority from the taxpayer in the form of a power of attorney, the Commissioner knew that under his own regulations he was not privileged to recognize anyone but the taxpayer acting through its own officers. When he did recognize someone other than the duly accredited representative of the taxpayer pursuant to his regulations, he must have known that he was dealing with someone acting without authority.

Respectfully submitted,

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